

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

TYLER DIVISION

COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION, INC.) DOCKET NO. 6:06cv324
)

-vs-)

) Tyler, Texas
BUFFALO TECHNOLOGY, INC.,) April 14, 2009
ET AL) 5:00 p.m.
)

MICROSOFT CORPORATION, ET AL)
) DOCKET NO. 6:06cv549
-vs-)

)
COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION, INC.)

COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION, INC.) DOCKET NO. 6:06cv550
)

-vs-)

)
TOSHIBA AMERICA, ET AL)

INTEL CORPORATION, ET AL)
) DOCKET NO. 6:06cv551
-vs-)

)
COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION, INC.)

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S

(SIGN-IN SHEETS DOCKETED IN EACH CASE)

COURT REPORTERS: MS. KIMBERLY JULIAN
MR. D. KEITH
JOHNSON
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PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY,
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

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P R O C E E D I N G S

(Following close of jury trial:)

THE COURT: All right. Mr. Jones, you
may proceed.

ALBERT PETRICK,
having been duly sworn, testified as follows:

EXAMINATION

BY MR. MIKE JONES:

Q Mr. Petrick, would you please just state your
name for the record real quick.

A Albert A. Petrick.

Q Mr. Petrick, are you familiar with what a
Letter of Assurance is?

A Yes.

Q And what is a Letter of Assurance?

A That's a legal document that the IEEE has in
place for companies that have proposals with
intellectual property that's being considered as a part
of the standard. It basically outlines the terms and
conditions for a Letter of Assurance.

Q And on occasions do chairmen of the committees
for the various applicable 802.11 standard committees
send out requests for such letters?

A Yes.

Q Thank you, sir.

1 Now, I would like to direct your attention to
2 the last exhibit in your notebook which I think has
3 already been admitted in evidence. This is a printout,
4 is it not, of all the Letters of Assurances that have
5 been given with regard to all the 802.11 standards and
6 the inventors, true?

7 A Yes.

8 Q Now, we won't go through all of those. But
9 let me ask you this: Why does the patent policy of the
10 IEEE request that those be given? Why are they
11 important?

12 A Well, they're important for several reasons,
13 one of which is if they're -- there is a piece of a
14 proposal that -- that has got intellectual property tied
15 to it, the standard requires that the LOA is put in
16 place prior to the approval of that particular standard.

17 Q Do members such as yourself on these various
18 committees rely upon these letters?

19 A Yes.

20 Q Are they important to you when you vote?

21 A They are important, because we would like to
22 know, you know, if there's a RAND commitment associated
23 with that or if there is a RAND-z commitment associated
24 with that.

25 Q Now, if you know about intellectual property

1 and you cannot get such a letter, would that affect the
2 way you would vote when you have been a member on these
3 intellectual committees?

4 MR. FURNISS: Object, calls for
5 speculation, Your Honor.

6 THE COURT: Overruled.

7 A Yes.

8 Q (By Mr. Mike Jones) And what kind of effect did
9 that have?

10 A Well, a couple things. When we're looking at
11 a particular proposal, we want to understand, you know,
12 if there's a royalty involved, if there's a licensing
13 fee that may affect the value of a particular proposal
14 if someone was to implement it.

15 Q Has your company in the past provided Letters
16 of Assurance?

17 A Yes.

18 Q Why would they provide Letters of Assurance,
19 sir?

20 A Well, the Letter of Assurance that we provided
21 at Harris Semiconductor in this particular case for .11b
22 was a RAND-z and a RAND commitment. And the purpose of
23 that was for the modulation we provided a RAND-z
24 commitment. And we were in the business at that time to
25 develop chipsets, and we felt that the modulation would

1 allow companies and individuals to go out and build
2 products to that particular standard without, you know,
3 being at the risk of any royalties of that sort.

4 On the RAND side of the commitment what we did
5 was if we had a particular implementation, we were
6 trying to protect anyone doing a copycat of our
7 particular implementation, we thought that that was
8 satisfied under a RAND commitment.

9 Q Now, when you were working as a committee
10 member on the 802.11 standard committee, are you allowed
11 to consider pricing?

12 A No, not absolute value. We could not discuss,
13 you know, the actual dollar figure, if you will.

14 Q You cannot discuss and you do not discuss what
15 the products would cost that might be subject to the
16 standard, right, sir, or how they would be priced?

17 A We can discuss the relative, but we cannot
18 discuss dollar figure.

19 Q Thank you, sir.

20 Do you consider, though, costs such as IP
21 costs that might be incurred in implementing the
22 standard?

23 A Yes.

24 Q Now, are you aware of any situations or
25 circumstances where excessive demands for IP have

1 affected the deliberations of an IEEE standards
2 committee?

3 A Yes.

4 Q And what occasions do you know of, sir?

5 A There was a situation back in the development
6 of 802.11a that was a proposal from Lucent and it had to
7 do with the fact that Lucent had a licensing fee
8 attached with a royalty associated with that as well on
9 the product costs.

10 Q Now, I would like to direct your attention to
11 the notebook, again, Exhibit 854.

12 MR. MIKE JONES: And Your Honor, I will
13 move for the admission of 854 for purposes of the RAND
14 trial only.

15 THE COURT: Any objection?

16 MR. FURNISS: No objection.

17 THE COURT: Be admitted for the Court
18 only.

19 MR. MIKE JONES: Thank you, Your Honor.

20 Q (By Mr. Mike Jones) And I would direct your
21 attention to page 317 of this document. Does this begin
22 a discussion of what was going on in connection with the
23 circumstances you were just describing?

24 A Yes.

25 Q And here Mr. Baker in these minutes -- these

1 are actual minutes of a meeting, right?

2 A Yes.

3 Q Does he indicate that he concerned about IP
4 costs and it's affecting the cost?

5 A Yes.

6 Q It's affecting the weight; is that correct,
7 sir?

8 A Yes.

9 THE COURT: Now, let me ask a question
10 here. The reference that will be difficult to anyone
11 other than Lucent, is that because Lucent had acquired
12 Radiata and had the license?

13 THE WITNESS: No.

14 THE COURT: Why would it be difficult for
15 anyone other than Lucent?

16 MR. MIKE JONES: Can I explain, Your
17 Honor?

18 THE COURT: I would rather for the
19 witness.

20 THE WITNESS: Could you restate the
21 question?

22 THE COURT: Why would it be difficult for
23 anyone other than Lucent, I mean, what was it that was
24 special about Lucent that it would not be difficult for
25 them?

1 THE WITNESS: Because they actually had
2 the weight form developed themselves.

3 THE COURT: Go ahead.

4 Q (By Mr. Mike Jones) Was there any relationship
5 between Lucent and Radiata, sir?

6 A No.

7 Q And does this refer in any way to the Radiata
8 or the '069 patent, sir?

9 A No.

10 Q Was this other technology that Lucent had?

11 A That's correct.

12 Q Thank you, sir.

13 THE COURT: Thank you.

14 Q (By Mr. Mike Jones) And if I could, I'm not going
15 to belabor this point and go through it, but these are
16 minutes of the station that went on where this
17 particular IEEE committee is discussing and talking
18 about IP costs in the way it affects your voting with
19 regard to this standard, right, sir?

20 A Yes.

21 Q And just not to belabor the point and try to
22 get through this, the judge will have this before you
23 and I'm not going to go through it, I would just ask
24 you, what was the resolution? How did this particular
25 situation work out?

1 A Relative to the IP costs?

2 Q Yes, sir, exactly. What I'm trying to say is,
3 obviously we could go through this and we could go point
4 by point a debate over IP costs and how it affected,
5 right, sir?

6 A Yes.

7 Q Could you just summarize for us and tell us
8 what happened? You were there, you participated in it.

9 A Yes. The Lucent particular LOA had come in at
10 a \$10,000 cost for the five percent royalty in the end
11 product that was being sold. There was a lot of
12 controversy on the floor in that whole subject matter.
13 And in return, Lucent had retracted that particular LOA
14 and kickback and decided to submit an LOA that was a
15 percentage or five percent royalty based on the
16 implementation at the chip level, not at the product
17 level. And the rationale that was behind that was
18 because the technology was actually implemented in the
19 semiconductor device itself.

20 Q Now, I would like to direct your attention to
21 the next occasion that you can tell us about that you
22 know of where IP costs affected the deliberations to the
23 standard or affected the standard itself?

24 A Another example was when we were developing
25 the first one- and two-megabit-per-second standard, we

1 were getting close to closure on that, and there was a
2 concern that there wasn't any security involved and
3 wrapped into the standard itself.

4 And with the time constraints of getting the
5 standard completed, the only solution that we had at
6 that time was RSA Security. So it was a security
7 algorithm that was actually adopted within the standard.

8 As part of that, RSA Security had put forth a
9 Letter of Assurance that put their -- that identified
10 their licensing terms and they broke it out into various
11 segments, including a one-time licensing fee with no
12 royalty.

13 Q Now, I would like to direct your attention to
14 Defendant's Exhibit 853, if you would look at it here?

15 MR. MIKE JONES: And Judge, for purposes
16 of the bench trial, we would move for admission of 853.

17 THE COURT: Any objection?

18 MR. FURNISS: No objection.

19 THE COURT: Admitted.

20 Q (By Mr. Mike Jones) And is this -- 835 is the
21 letter that RSA Data Security sent in reference to this
22 controversy, correct?

23 A Yes.

24 Q And what kind of fees did they charge?

25 A Well, there were fees ranging from 5,000 to

1 70,000 for prepaid licensing fees with a royalty
2 associated on a per unit for implementing that
3 particular security algorithm based in implementing in
4 either software or hardware.

5 And they also had another option which was a
6 one-time fee per company with no royalty for a value of
7 125,000.

8 Q Thank you, sir. Finally --

9 THE COURT: Excuse me, Mr. Jones, what
10 was the royalty rate?

11 THE WITNESS: There was no royalty rate
12 on that. There was particular -- these were just
13 various options.

14 In particular, at Harris Semiconductor
15 our engineers took a look at that and what it would take
16 to actually implement this particular security algorithm
17 and hardware, and from a business perspective when we're
18 looking at, you know, what it's going to cost, a typical
19 business plan you would set up is to deliver either a
20 million units or 5 million units over a two- or
21 three-year period. And when you amortize that 125,000
22 over 5 million units, you're talking a couple of cents.

23 THE COURT: I thought you were talking
24 about there were two options; one was the one-time fee
25 of 125,000 the other one was a 5 to \$7,000 fee plus a

1 royalty?

2 THE WITNESS: Yes, that's right. Those
3 were the two options. One was 125,000 with no royalty,
4 and the other one was a licensing fee from 5, 15, 35 and
5 75, 70,000 with a per-unit royalty that was ranging
6 anywhere from a dollar to 25 cents per unit.

7 MR. MIKE JONES: And Your Honor, if the
8 Court would like, I have that royalty schedule right
9 here.

10 THE COURT: Okay. Let me ask on this
11 one, what were the units selling for?

12 THE WITNESS: Back then, anywhere from 40
13 to \$50 per chipsets.

14 THE COURT: Thank you.

15 Q (By Mr. Mike Jones) Directing your attention to
16 your work on the 802.11 committee, particularly "a" and
17 "g" committees, with regard to that, what affect would
18 it have to you as a committee member if you had known
19 that somebody was paying a multi-dollar royalty on those
20 types of products?

21 A It would make me have reservation on selecting
22 that particular proposal.

23 Q And why was that?

24 A Well, not knowing what -- not knowing what
25 their actual royalty rate was or if I did know what

1 their royalty rate was, it raised concern on how well
2 this would actually sell in the market and if I could
3 actually be competitive in the market for the particular
4 licensing fee.

5 MR. MIKE JONES: Your Honor, we would
6 also like at this time to introduce, with regard to IEEE
7 minutes, Exhibit 899 which are IEEE minutes, Exhibit
8 0368, Exhibit 898 and Exhibit 0900. And these, again,
9 are merely for the purposes of the RAND trial.

10 THE COURT: Any objection?

11 MR. FURNISS: I object, Your Honor.
12 These were not identified prior to this afternoon.

13 MR. MIKE JONES: I'll be happy to do it
14 at another time.

15 THE COURT: All right. Y'all try to get
16 together on these exhibits for the RAND trial and let's
17 try to do them the same way instead of taking them one
18 at a time. Go over them and let's just get them offered
19 and in.

20 MR. MIKE JONES: Thank you, Your Honor.
21 I pass the witness.

22 THE COURT: All right. Cross-exam.

23 CROSS-EXAMINATION

24 BY MR. FURNISS

25 Q Good afternoon, Mr. Petrick.

1 A Hello.

2 Q Now, when the IEEE sends a Letter of
3 Assurance, does it provide -- back in 1998, did it
4 provide forms that the responder could use to respond to
5 the request for a Letter of Assurance?

6 A Yes.

7 Q And there were three forms, were there not?

8 A I don't remember the number of forms.

9 Q Do you recall there were forms that said we'll
10 allow you to use the patent without any charge, that was
11 one of the options; isn't that right?

12 A Yes.

13 Q And the other option was to agree to provide
14 licenses at reasonable and nondiscriminatory rates or
15 RAND; isn't that right?

16 A Yes.

17 Q Now, when someone agrees to a reasonable and
18 nondiscriminatory royalty, does that mean zero?

19 A Reasonable and nondiscriminatory?

20 Q Yeah. Does it mean zero dollars per unit?

21 A No.

22 Q Does it mean five cents per unit?

23 A Don't know.

24 Q Ten cents?

25 A Don't know.

1 Q Well, when a RAND letter is given, how will
2 you expect -- because it's down the road if it happens,
3 how will you expect the parties to reach an agreement as
4 to a reasonable royalty?

5 A It depends on, you know, the -- I don't know.

6 Q Could they get together and try and negotiate
7 a reasonable rate?

8 A Sure.

9 Q Now, do you know any of the history of CSIRO's
10 attempts to license this patent?

11 A No.

12 Q Are you aware that none of the defendants in
13 this room, prior to the initiation of this lawsuit,
14 offered any documents for this patent?

15 A Prior to the --

16 Q Prior to start of the litigation, are you
17 aware of none of the defendants that were contacted
18 offered anything, zero?

19 A I was not aware of that.

20 Q You're not aware of that?

21 A Prior the start of this litigation?

22 Q Yes.

23 A I was not aware of that.

24 Q Would you agree with me that if the buyer sets
25 the price, then it would almost always be zero?

1 A If the buyer -- I'm sorry?

2 Q Right. If the buyers, if the people who were
3 using the standard were unilaterally allowed to set
4 whatever price they wanted, it would almost always be
5 zero, wouldn't it?

6 A Yes.

7 Q And isn't that what happened here?

8 A Yes.

9 Q The entire industry got together and decided
10 that they weren't going to offer CSIRO anything; isn't
11 that what happened?

12 A No.

13 Q You don't know that?

14 A No.

15 Q Do you know anything about the history of
16 these negotiations?

17 A No.

18 Q So let me give you a hypothetical then since
19 you're presenting yourself as an expert in RAND matters.
20 What if the buyers of the standard, the users of the
21 standard get together and decide that they're not going
22 to offer anything, what does the RAND letter mean in
23 that situation?

24 A It's whatever they come up with.

25 Q Whatever the buyers come up with?

1 A Whatever has been negotiated between them.

2 Q Well, if a negotiation is we'll give you
3 nothing, what does the patent holder do in that
4 situation?

5 A That means you don't get nothing.

6 Q So the buyers collectively decide that the
7 patent holder gets nothing; is that you're understanding
8 of a RAND letter?

9 A No.

10 Q Well, how would you deal with that situation?

11 A I don't know.

12 Q You mentioned the RSA situation. In that
13 situation, the IEEE contacted RSA; isn't that right?

14 A Yes, we did.

15 Q And essentially said to them, unless you give
16 us a royalty we like, we're not going to put your
17 technology in the standard; isn't that right?

18 A I don't know.

19 Q Isn't that what happened with Lucent, if you
20 don't drop your royalty rate we're not going to use your
21 technology in the standard; isn't that what happened
22 with Lucent as well?

23 A Yes.

24 Q So in effect, the committee was in the
25 position to set the price of particular intellectual

1 property rights; isn't that right?

2 A No, it wasn't.

3 Q Well, they were able to tell Lucent, a huge
4 company, that they had to drop their royalty or they
5 would not be included in the standard, isn't the effect
6 of that to set the price for the patent rights?

7 A But they didn't set the standard -- they
8 didn't set the price.

9 Q Well, you just told me they withdrew their
10 Letter of Assurance.

11 A They withdrew their Letter of Assurance and
12 they came back -- they, meaning Lucent, came back with a
13 new Letter of Assurance of something that was reasonable
14 for the group to accept.

15 Q And what was that rate?

16 A That was a five percent royalty on the
17 implementation cost.

18 Q Now, do you recall that Bruce Tuch made some
19 comments to the group?

20 A Yes.

21 Q And was that when he said that they would go
22 to a five percent royalty on the chip?

23 A Yes.

24 Q So there was in effect a negotiation with
25 Lucent, wasn't there?

1 A There was a comment made by Lucent. Nobody
2 really negotiated. Lucent basically came back with
3 something that was acceptable to the group.

4 Q And they understood that if they didn't come
5 back with something that was acceptable to the group,
6 that the technology would not be incorporated in the
7 standard; isn't that right?

8 A No. Or they would have come back and looked
9 at other alternatives or looked at ways to get that
10 particular standard under consideration.

11 Q In other words, they would have designed
12 around Lucent technology, right?

13 A It may have been.

14 Q Now, there's been a lot of mention of the IEEE
15 website. Are you familiar with that? Did you hear that
16 testimony?

17 A Yes.

18 Q And on the IEEE website, the CSIRO patent is
19 listed, isn't it?

20 A Yes, it is.

21 Q And there's a contact person for CSIRO; isn't
22 that right?

23 A Yes.

24 Q And did anyone attempt to contact CSIRO and
25 say what would your royalty rate be just like they've

1 done with RSA Security?

2 A That's the obligation of the chair or the
3 patent committee.

4 Q Well, Mr. Hayes wrote a letter to CSIRO,
5 right?

6 A Yes.

7 Q And CSIRO came back and said it would be
8 reasonable, right?

9 A Yes.

10 Q And what we have here is the respective
11 parties' difference of what the term "reasonable" means;
12 isn't that right?

13 A Yes.

14 Q And isn't it true that the IEEE itself takes
15 no position as to what is reasonable or not reasonable?

16 A That's correct.

17 Q So there was no contract or agreement between
18 CSIRO and the IEEE as to what reasonable would or would
19 not be, it would be set by negotiation; isn't that
20 right?

21 MR. MIKE JONES: We object to this, Your
22 Honor. He doesn't know what contract or agreements
23 there were.

24 THE COURT: Overruled.

25 A Can you repeat the question, please?

1 Q (By Mr. Furniss) Isn't it true that there was no
2 agreement between CSIRO and the members of the IEEE that
3 would charge any particular royalty rate except one that
4 was, quote, reasonable?

5 A It's not true, because I don't know if there
6 was any agreements between the members of the IEEE and
7 CSIRO.

8 Q Well, in fact you know there are no such
9 agreements; isn't that right?

10 A I don't know.

11 Q Well, you were chairman of the committee. Did
12 you ever hear there was such an agreement?

13 A No. I was not -- I was vice chairman, I
14 wasn't chairman of the committee.

15 Q Sorry.

16 Now, if the letter says reasonable
17 nondiscriminatory, do you have an understanding what the
18 term "discriminatory" means?

19 A Yes.

20 Q And what does that mean?

21 A It means that I can't license it for one price
22 to one individual or company and license and price to
23 another individual company.

24 Q Is that to all companies or to
25 similarly-situated parties?

1 A I don't know.

2 Q And as far as reasonable, you don't know
3 exactly how that would be set in any particular case
4 either, do you?

5 A No.

6 Q And you don't know whether CSIRO was being
7 reasonable or not being reasonable, do you?

8 A I do not.

9 Q And you don't know whether CSIRO was willing
10 to negotiate or not on a reasonable rate; isn't that
11 true?

12 A That's true.

13 Q Now, you've done negotiations, haven't you?

14 A Yes.

15 Q Do you start with your bottom line when you
16 make an offer to someone?

17 A I do a number of things.

18 Q Do you start with your bottom line when you
19 make an initial offer to some people?

20 A Yes.

21 Q You go right to the bottom, you never
22 negotiate; is that right?

23 A I go with what's fair and reasonable in my
24 mind.

25 Q What you think is fair and reasonable?

1 A Yes.

2 Q Do you have any reason to believe that CSIRO
3 did anything different than that?

4 A I don't know.

5 Q So you don't have any opinion that CSIRO
6 violated any commitment to the IEEE, do you?

7 A No.

8 Q And you don't have any reason to believe that
9 CSIRO's patent rights should be restricted because of
10 its Letter of Assurance to the IEEE?

11 A Can you repeat that?

12 Q You don't have any reason to believe that
13 CSIRO's rights should be restricted or are restricted
14 because of its RAND letter to the IEEE?

15 A No.

16 MR. FURNISS: Pass the witness, Your
17 Honor.

18 THE COURT: Redirect?

19 REDIRECT EXAMINATION

20 BY MR. MIKE JONES:

21 Q You said you didn't have any reason to believe
22 the rights were restricted by the RAND letter. You
23 believe those RAND letters are important, right?

24 A Yes.

25 Q And you believe those are commitments that

1 should be kept, don't you, sir?

2 A Yes.

3 Q Thank you, sir.

4 Now, the business of the committee is to set
5 standards, right, not cost for IP?

6 A That's right.

7 Q And there is no obligation on the committee at
8 all to use any particular technology, right, they can
9 choose what they want to?

10 A That's correct.

11 Q And one of the things that you do consider and
12 often do consider is what IP costs and whether or not
13 RAND commitments have been made, right?

14 A Yes.

15 Q Thank you, sir.

16 MR. MIKE JONES: I pass the witness, Your
17 Honor.

18 THE COURT: Let me just ask a couple
19 follow-up questions. Did the committee ever contact
20 CSIRO with regard to using -- going with this standard
21 or not going with this standard depending upon what
22 royalty they might charge?

23 THE WITNESS: No. The only contact that
24 they made with CSIRO, that I can recall, is in the last
25 year with respect to .11n, and that had to do with the

1 fact that they were looking for a particular Letter of
2 Assurance in the proper form.

3 THE COURT: All right. But in regard to
4 this -- the letters that have been introduced as
5 Plaintiff's Exhibit 87 and Defendant's -- let's see,
6 Defendant's 887 and Plaintiff's 86, that was the only
7 communication between the committee and CSIRO prior to
8 the adoption of the standard?

9 THE WITNESS: As far as I can recall,
10 yes.

11 THE COURT: Thank you. All right. You
12 may stand down.

13 Who will be your next witness?

14 MR. MIKE JONES: Dr. Shoemake.

15 May he be excused, Your Honor?

16 THE COURT: Yes. He may be excused. Any
17 objection, Mr. Furniss?

18 MR. FURNISS: No, Your Honor.

19 THE COURT: All right. He can be
20 excused.

21 MATTHEW SHOEMAKE,
22 Having been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. MIKE JONES:

25 Q Dr. Shoemake, please state your name for the

1 record again.

2 A Matthew Brendon Shoemake.

3 Q Now, Dr. Shoemake, you were the chairman of
4 the 802.11g standards committee, right, sir?

5 A Yes. It actually goes by the name task group.
6 Yes, I was.

7 Q Now, we have in evidence, the Court can
8 certainly see the patent policy of the IEEE. But let's
9 go through it a little bit with regard to letters of
10 assurance.

11 If a person attends the committee meetings,
12 correct --

13 A Yes.

14 Q -- is the patent policy presented to them?

15 A Yes, it is.

16 Q How is the patent policy presented?

17 A So at every meeting as a standing part of my
18 agenda, I had a set of slides, two or three slides that
19 I would put in front of the members to inform them that
20 there was a patent policy and go over key elements of
21 that policy and also to solicit their compliance with
22 that policy.

23 Q Thank you, sir. And as part of that policy,
24 does it tell people that if you know of any patents that
25 might be applicable in this area, you need to disclose

1 them to the committee?

2 A Yes, absolutely.

3 Q And it is based upon your request to the
4 people that are in attendance that you become
5 knowledgeable about patents as the committee chair; is
6 that correct?

7 A Yes. That's absolutely correct.

8 Q And then if you become knowledgeable as
9 committee chair, do you then send them someplace -- send
10 notice to another part of the IEEE so that requests can
11 be made for letters of assurance?

12 A So, yes, this can happen multiple ways, so I
13 would --

14 Q Tell us how that would happen.

15 A So this is how this happens. I give the
16 presentation. I inform the membership of the patent
17 policy of their duties as a member under these policies,
18 and I request at every meeting if they know of such
19 patents that may relate to -- to the standard to
20 disclose that.

21 I actually pause in the meeting and ask --
22 they can come to the mike from -- there's a microphone
23 in there, and they could from the floor at that time
24 notify us. We also make them aware that there is a
25 standard form that they can fill out, which may have

1 been what you're referring to. There's a standard form
2 that they can also fill out and submit to us as well.
3 So they have multiple ways to do this.

4 Q Okay. Now, once they do that, what -- what
5 happens then? How does the process continue?

6 A Certainly. So, for example, if I receive a --
7 one of these letters, indicating their compliance, what
8 happens is I take that letter, I forward it to the
9 chair -- the chair above me, the working group chair; it
10 gets forwarded to the IEEE's headquarters in Piscataway,
11 New Jersey, and actually posted on the website.

12 Q How -- okay. Now, the companies, they can
13 voluntarily give the letters, right?

14 A That's correct, yes, sir.

15 Q Or they can be requested to give the letters?

16 A Yes. That's correct.

17 Q Once y'all have notice of the letters?

18 A That's correct.

19 Q Are any attempts whatsoever made by the IEEE
20 to determine whether or not the patents that are listed
21 actually apply to the standard?

22 A We do not.

23 Q Okay. That's never done?

24 A We do not. As a matter of practice, we do
25 not. We try to illuminate the situation so people know

1 what the patents are. But we do not, as the IEEE, try
2 to determine whether or not they bear on the standard or
3 not.

4 Q Now, with regard to the patent's validity, is
5 anything done with regard to that?

6 A No, definitely not.

7 Q Now, we have seen -- in your slides, I
8 believe, the slides that you showed that give this
9 patent policy that you give at the beginning of every
10 meeting --

11 MR. MIKE JONES: That's Defendant's
12 Exhibit 297, Your Honor. I believe there is no
13 objection to that. It's for purposes of the RAND trial
14 only.

15 MR. FURNISS: No objection, Your Honor.

16 THE COURT: Be admitted.

17 Q (By Mr. Mike Jones) Now, we've already put it
18 into evidence, and we're not going to put it up again.

19 A Okay.

20 Q But we have seen the IEEE's website that lists
21 all of the patents with regard to the 802.11 that have
22 been dedicated.

23 A Okay.

24 Q Okay. And you're familiar with that?

25 A I am indeed.

1 Q And there are literally dozens of companies
2 that have listed a hundred or more patents, right?

3 A Yes, sir.

4 Q Now, with regard to all of those letters of
5 assurance -- and let me zero in a little bit more with
6 my questioning.

7 With regard to your work on the 802.11g
8 committee, all the patents that you got letters of
9 assurance from are listed there, right, sir?

10 A Yes. That's correct.

11 Q Now, in your work on the "g" as well as the
12 other committees' work on the other standards, do you
13 rely on those letters?

14 A Yes.

15 Q Do you, in fact, consider whether or not you
16 have letters like that for patents that you know of?

17 A We do. In fact, the purpose of our procedure
18 is to solicit these letters to get them into the record
19 in a very public way on our website so members can take
20 them into consideration in their voting.

21 Q And is there anything wrong with members
22 taking that into consideration in their voting, taking
23 into consideration, number one, whether or not such
24 letters exist and also taking into consideration the
25 cost of intellectual property that might be applicable

1 to the standard? Is there any prohibition to that?

2 A No. There's no prohibition on that.

3 Q Now, with regard to your work on the "g"
4 committee, we know that -- we know that the patent was
5 disclosed on the "a" and that there was a letters of
6 assurance on "a". You've seen that?

7 A Yes, I have.

8 Q With regard to your work on the "g", did they
9 ever disclose the patents?

10 A The CSIRO patent, no, sir, they have not.

11 Q And did anyone ever submit a letter of
12 assurance?

13 A No, sir. I never received one.

14 Q Now, do you know of any situations where
15 people who have been on -- excuse me -- let's strike
16 that. Let me start over again.

17 Do you know of any situations -- do you have
18 any knowledge of any situations where intellectual
19 property costs affected either the deliberations of an
20 802.11 standards committee or an IEEE standards
21 committee or a standard that was enacted by an IEEE
22 standards committee?

23 A I do.

24 Q Okay. Can you tell us of that situation.

25 A The one I'm the most familiar with is actually

1 after a standard was set. There's something called the
2 IEEE 1394 standard. In the marketplace, it's sometimes
3 referred to as Firewire.

4 And early this decade, approximately 2001,
5 Apple computer, after the standard was set, announced
6 that they were going to charge a royalty of one dollar
7 per 1394 port. And what this did was there was -- if
8 you're not familiar with 1394, this is a technology to
9 connect computers to things like printers and digital
10 cameras and video camcorders.

11 And what this did was it caused the
12 marketplace to move to -- to an alternative. There's an
13 alternative technology that did a very similar thing,
14 arguably not quite as good as 1394 in some aspects, but
15 it was -- but that was adopted because this one dollar
16 royalty report actually pushed the whole market towards
17 USB, and manufacturers of digital cameras, mobile
18 phones, et cetera, started choosing USB over IEEE's 1394
19 standard.

20 Q Now, going back to the time that you're
21 chairman of the 802.11g committee. What effect would a
22 multi-million-dollar royalty claim have had on you and
23 your work there and your vote there if you had known
24 about one that was applicable to the proposed at that
25 point in time, 802.11g standard?

1 A So I was actually one of the voters that voted
2 for the compromised proposal. And if I had thought or
3 known that there was going to be a multi-dollar royalty,
4 I would not have voted for it. I would have voted
5 against.

6 Q And why is that, sir?

7 A Because my background has been, for many
8 years, in the semiconductor business. And I know for
9 example at the time -- just as an example, I was working
10 at Texas Instruments in our WiFi business. We had a
11 roadmap to make WiFi chips cost \$10, down to 5, down to
12 \$3. So if we were looking at a multi-dollar royalty on
13 our chips, it would be -- it would actually be -- it
14 would materially, in an adverse way, affect our business
15 by raising costs, and it would make us noncompetitive.
16 And I knew that there were potentially paths to avoid
17 that.

18 Q Thank you, sir.

19 MR. MIKE JONES: I pass the witness, Your
20 Honor.

21 THE COURT: All right. Cross-examine.

22 MR. FURNISS: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. FURNISS:

25 Q Good afternoon, Mr. Shoemake. I think we've

1 met before. I'm Dan Furniss, and I represent CSIRO.

2 Nice to meet you.

3 A Nice to meet you, sir.

4 Q Did the IEEE receive a RAND letter of
5 assurance from CSIRO on 802.11g?

6 A They did not.

7 Q Did not. Did the committee ask CSIRO for a
8 letter of assurance on 802.11g?

9 A I did not ask CSIRO directly for a letter. I
10 solicited membership for -- for letters.

11 Q But you're aware that 802.11g was -- used the
12 same technique as "a"; in fact, it was taken from "a" to
13 "g" and the only material change was the frequency
14 change when it went from the 5 gigahertz band to the 2.4
15 gigahertz band?

16 A I was aware that "g" was using "a" technology
17 as part of our draft standard, yes, sir.

18 Q Now, the -- the example that you gave when the
19 cost of -- affected the voting on the standard, in that
20 situation, the committee knew of the price of the IP,
21 right? The Apple situation, they knew that Apple wanted
22 a dollar a unit?

23 A No, they did not. Apple made this
24 announcement after IEEE 1394 had been ratified.

25 Q But you said they went back at changed it,

1 right?

2 A This changed -- maybe I wasn't clear. The
3 change -- the IEEE 1394 standard did not change. The
4 change actually happened in the marketplace. The
5 marketplace shifted from two competing standards, one
6 IEEE and one non-IEEE.

7 The USB standard comes from an organization
8 called the USB Implementers Forum, and it shifted
9 momentum towards that standard and away from IEEE's 1394
10 standard after ratification.

11 Q Well, in this situation, you're aware that
12 CSIRO has been attempting to license the patents since
13 2003; is that right?

14 A I am now. But not at that point in time.

15 Q And the market has available to it other
16 technologies it could shift to if it thought CSIRO's
17 demands were excessive; isn't that true?

18 A No, not at this point in time.

19 Q Well, all the devices -- there have been
20 testimony that all of the devices are 802.11b
21 compatible, right?

22 A So there's not another option right now where
23 there is 802.11b compatibility with a higher data rate.
24 So in the example I gave, 1394 and USB, there was a way
25 to switch. And in this case, there's no longer another

1 standards organization where you can have backward
2 compatibility with 802.11b and have -- and in the market
3 realistically shift.

4 Q Isn't it true that CSIRO gave no letter of
5 assurance on 802.11g, right?

6 A That's true. That is a true statement.

7 Q So do you have any belief or opinion that
8 CSIRO's patent rights in the '069 patent are restricted
9 in any way as to 802.11g?

10 A I do.

11 Q What's the basis for it?

12 A So the basis for that is that -- if it's okay
13 with you, I'll answer this as a voting member. I was
14 also a member, and I voted on 802.11g, not as
15 chairperson but --

16 Q Did you know about CSIRO's patent when you
17 voted?

18 A I did not.

19 Q How can you tell us what you would have done
20 five years ago?

21 A Well, so I can answer with respect to if I'd
22 known that there was a royalty to pay, what I would have
23 done.

24 Q Any royalty at all?

25 A No, not any royalty. A royalty that would

1 have inhibited the market and made it noncompetitive.

2 Q Well, you understand that WiFi is included in
3 computers that can cost \$400, \$500, \$1000, \$2000; isn't
4 that right?

5 A Yes, that is correct. I understand that.

6 Q Would you consider a dollar royalty to be
7 prohibitive in that -- to those kinds of manufacturers?

8 A I would.

9 Q Even if it's half of one percent of a price?

10 A I would. Because this is like saying that a
11 car costs \$20,000 and trying to put a multiple dollars
12 on a lug nut. This is a component in the computer. It
13 is not the -- the WiFi technology exists in a small
14 piece of the computer that's really dominated by a chip
15 and the now single chips that don't cost nearly the
16 price of the computer. They cost single dollars.

17 Q You worked for Texas Instruments, did you not?

18 A I did. That's correct.

19 Q And were you aware that Texas Instruments
20 charges royalties as a percentages of finished products?

21 A To tell you the truth, I'm not that familiar
22 with what Texas Instruments has done in the various
23 markets with charging royalties.

24 Q Well, you referred to the DRAM -- the DRAMS,
25 did you not?

1 A I have not, sir.

2 Q I thought you referred to computer memory in
3 your testimony just a few minutes ago -- to the DRAM
4 situation.

5 A No, sir. That may have been another witness.

6 Q Okay. I must have misheard you.

7 Were you aware that IBM charged percentage
8 royalties on finished products?

9 A I'm not familiar with IBM's -- how IBM charges
10 for their intellectual property.

11 Q So you don't really know what a reasonable
12 royalty is for any particular product, do you?

13 A No. I do, actually.

14 So, for example, in the -- in the space of
15 WiFi, reasonable royalties would be -- would be
16 royalties that are in tune with the -- the value that is
17 brought by that technology to -- to the actual product
18 versus other alternatives that may be there. So the
19 incremental value that's been brought by that
20 technology.

21 Q And if WiFi added \$50 or \$100 to the value of
22 a product, would a dollar royalty be excessive in those
23 situations?

24 A I'm sorry. I didn't follow your question.
25 Can you repeat it?

1 Q If a WiFi-enabled product were \$50 or \$100
2 more than a non-WiFi-enabled product, would it be
3 reasonable to charge a percentage or a per-unit royalty
4 in that situation?

5 A No, not in my opinion. I would think it's --
6 me, as a member of the IEEE, when you ask me about
7 reasonable and nondiscriminatory and -- in the
8 reasonable part, I think about if there is intellectual
9 property that bears on the standard, I think about what
10 is reasonable is that -- that that is attached to the
11 product that actually implements that functionality in
12 the system.

13 MR. FURNISS: Your Honor, may I approach
14 the witness?

15 THE COURT: Yes, you may.

16 Q (By Mr. Van Nest) Mr. Shoemake, let me show
17 you what has been marked as Defendant's Exhibit 124.

18 A Okay.

19 Q And I believe -- I'm going to ask you about
20 Page 4. But have you seen that document before?

21 A I may have. I don't recall. I certainly
22 haven't seen it recently. I was at this meeting -- this
23 is meeting minutes for a meeting that took place in The
24 Netherlands.

25 Q If you look on Page 4 there --

1 A Okay.

2 Q -- under the plenary meeting?

3 A Okay.

4 Q 9.4 -- it says 9.4.1. "Antitrust laws
5 reviewed by Dick Hayes stressing that product pricing
6 should not be discussion of IEEE meetings and
7 intellectual property pricing as well." Do you see
8 that?

9 A Yes, sir, I do.

10 Q So it's not allowed to discuss the pricing of
11 intellectual property in the IEEE; isn't that right?

12 A What's not allowed is discussing dollars. So
13 when Mr. Hayes, the chair, talks about price -- and when
14 I was a chair and had this direction from him and also
15 the other chair that came after him -- was when he says
16 price, do not talk about dollars. So that's what he --
17 and so that is a true statement.

18 Q Well, how do you talk about price without
19 talking about money?

20 A Well, we analyze a lot of the cost. So
21 members, what we try to do in our policy, is we try to
22 illuminate the patents that are out there. We try to,
23 since we are engineers, and so as a matter of our
24 policy, we -- we stay away from trying to value those,
25 but we do try to illuminate, so every individual member,

1 along with taking into consideration how long it might
2 take them to build the standard and how much silicon
3 area it might take, they can take into account these
4 patent statements and they can try to estimate these
5 things.

6 We, just as a matter of our proceedings, we --
7 we don't allow discussing of price inside our
8 proceedings.

9 So with respect to -- if you ask me with
10 respect to cost, do people analyze -- do members analyze
11 costs, they do. Engineers do things just like --

12 Q I think you answered my question. In the
13 context of IP rights, is there any distinction between
14 price and cost? I mean the price is the cost for a
15 patent license, isn't it?

16 A Yes. I can't think of an exception right now.

17 Q And in order to rely upon a RAND letter of
18 assurance, you have to know what someone might charge as
19 their cost for their IP or their price for their IP;
20 isn't that right?

21 A I'm sorry. Could you repeat the question
22 again?

23 Q In order to rely upon a letter of assurance,
24 if there is one, you have to know something about what
25 the IP owner thought was a reasonable value for their

1 IP?

2 A So I think the answer is yes. A member would
3 need to estimate what -- what this means and take and
4 try to come up with maybe their own estimate on what
5 that cost or price might be.

6 Q So -- and you agree that no one ever contacted
7 CSIRO either with regard to 802.11a, where they gave a
8 letter of assurance, or with regard to 802.11g, where
9 they didn't; isn't that true?

10 A So with respect to 802.11a, I was not
11 involved. With respect to 802.11g, as chairman, all of
12 my actions were to -- to solicit from the -- from the
13 chair, if you will. And I did not personally send a
14 letter directly so CSIRO soliciting them.

15 Q And my last question: Isn't it true that you
16 can't rely upon something you don't know? Isn't that
17 right?

18 If you have no idea what the cost -- what the
19 price will be, how can you rely upon it? If the letter
20 says "reasonable royalty," what are you relying upon,
21 other than people being reasonable?

22 A Oh, I think you can. I think you -- you can
23 rely on what reasonable is. You know what your
24 building, whether it's a lug nut or a WiFi chipset, and
25 you can -- you can look and you can look -- and in the

1 case of patents, you can look and you can try to
2 determine the value that is broad. You can try to make
3 sure that the value, as well as other alternatives --
4 that the cost or price in this case are in proportion,
5 to make sure things are reasonable.

6 Q And you don't know in CSIRO's case whether
7 that was true or not; isn't that right?

8 A So in CSIRO's case, I did not know what --
9 what was being asked at the time. I subsequently
10 learned, I believe, last year was the first time I
11 learned what was being asked.

12 Q Isn't it true that CSIRO made contact with
13 members of the IEEE prior to the ratification of
14 802.11g?

15 A I'm not aware of that, sir.

16 Q Would that -- if they did, would that make a
17 difference in your analysis?

18 A I'm not sure what -- it might depend on the
19 type of contact.

20 Q Thank you, Mr. Shoemake.

21 MR. FURNISS: Pass the witness.

22 THE COURT: Any redirect?

23 MR. MIKE JONES: No, Your Honor.

24 THE COURT: Very well. You may stand
25 down.

1 MR. MIKE JONES: May he be excused?

2 THE COURT: If there's no objection. Any
3 objection to the witness being excused?

4 MR. FURNISS: No.

5 THE COURT: That will be fine. The
6 witness is finally excused.

7 Any further RAND testimony this evening.

8 MR. MIKE JONES: Not tonight, Your Honor.

9 THE COURT: All right. Anything further
10 from either party?

11 All right. Y'all have a good evening.
12 We'll be in recess until tomorrow morning.

13

14

15 REPORTER'S CERTIFICATE

16 We certify that the foregoing is a correct
17 transcript from the record of proceedings in the
18 above-entitled matter. Dated at Tyler, Texas, this the
19 14th day of April, 2009.

20

21

D. KEITH JOHNSON, RDR, CRR

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KIMBERLY J. JULIAN, RPR, CRR

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